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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944.

No. 163.

THE PEOPLE OF THE STATE OF NEW YORK, on the relation of MICHAEL MONTAGNO,

Petitioner,

against

VERNON A. MORHOUS, as Warden of Great Meadow Prison, Comstock, New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX

PAGE

Statement of the Case 1
The Facts 2
Point I—Certiorari should not be issued to review the proceedings in the State Courts upon a Writ of Habeas Corpus, which is a collateral attack upon the judgment of conviction 2
Point II—The petitioner has failed to overcome the presumption of regularity attaching to the proceedings in the Trial Court 3
Conclusion 3
Appendix—Opinion 5

CITATIONS.

Matter of Lyons v. Goldstein, 290 N. Y. 19 2
New York *ex rel.* Whitman v. Wilson, 318 U. S. 688 2
Matter of Vernon A. Morhous, as Warden of Great Meadow Prison v. The Supreme Court of the State of New York, decided June 14, 1944, not yet officially reported 3

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Statement of the Case

The petitioner prays for a writ of certiorari to review the order of the Court of Appeals of the State of New York, entered on the 18th day of May, 1944, in a proceeding upon a writ of habeas corpus.

The order of the Court of Appeals (Petition, p. 29a, b) affirmed, without opinion, the order of the Appellate Division of the Supreme Court of New York (R. p. 127) which affirmed, *per curiam*, the order of the Special Term of the Supreme Court (R., p. 64, 65) dismissing the writ and remanding the petitioner.

The Facts

It is to be noted that petitioner has included in the papers submitted by him to this Court respondent's brief in the Court of Appeals of the State of New York (R. pp. 170-184). This brief contains a complete statement of the facts of this cause. In the interest of brevity and to save repetition reference is had to that brief.

POINT I

Certiorari should not be issued to review the proceedings in the State Courts upon a Writ of Habeas Corpus, which is a collateral attack upon the judgment of conviction.

By this application petitioner seeks to review the dismissal of a writ of habeas corpus, the petition for which alleged as its only ground that in the proceedings of the trial court which led to petitioner's first conviction twelve (12) years ago petitioner had been deprived of his right to counsel. This contention was disputed, and resolved against petitioner.

The appropriate and exclusive remedy for such a deprivation of constitutional rights, if it occurred, is appeal from the judgment of conviction.

Even after the time limited for appeal has expired, the courts of New York provide an adequate remedy in the nature of a writ *coram nobis* upon application to the court of original jurisdiction to open and review its proceedings upon the trial for errors constituting denial of due process of law (*Matter of Lyons* v. *Goldstein*, 290 N. Y. 19). This court has recognized the right of the New York courts to determine whether habeas corpus is an appropriate remedy. (*New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688.)

The entire practice and jurisprudence of the State of New York concerning habeas corpus and its availability to correct errors, irregularities and injustices occurring upon the trial is reviewed and summed up in a very recent opinion of the Court of Appeals of the State of New York (*Matter of Vernon A. Morhous, as Warden of Great Meadow Prison* v. *The Supreme Court of the State of New York*, decided June 14, 1944, not yet officially reported) a copy of which opinion is hereto annexed.

POINT II

The petitioner has failed to overcome the presumption of regularity attaching to the proceedings in the Trial Court.

This point is argued and discussed at length in Point I (R. pp. 175-182) of respondent's brief in the Court of Appeals of the State of New York, to which we respectfully refer.

Conclusion

The petitioner has not only mistaken his remedy, but has failed to overcome the presumption of the regularity attaching to the proceedings in the trial court. This cause presents no question warranting review by this Court, and the petition should be denied.

Dated: July 10, 1944.

Respectfully submitted,

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